

No. 3022

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOGAN BILLINGSLEY and FRED BILLINGSLEY,

Paintiffs in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error

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STATEMENT OF THE CASE.

The indictment in this case charged the plaintiffs in error, Logan Billingsley and Fred Billingsley, together with other defendants named therein, with a conspiracy to violate Sec. 238 of the Act of Congress of March 4, 1909, Chap. 321, otherwise known

as the Penal Code of the United States relating to the shipment of intoxicating liquors, shipped from one state to another over a common carrier engaged in Interstate Commerce. (Tr. pp. 2 to 13). This indictment was filed in the District Court for the Western District of Washington, Northern Division, on the 21st day of December, 1916, and on the 10th day of January, 1917, the plaintiffs in error were arraigned and entered a plea of guilty to the charge contained in the indictment. The record relating to the arraignments and pleas is as follows: "Now on this 10th day of January 1917, into open court came the defendants, Logan Billingsley, Fred Billingsley and William H. Pielow, for arraignment, and each answered their true names are as above, whereupon the reading of the indictment was waived, and they each enter a plea of guilty to the charge in the indictment herein against them." (Tr. pp. 13 and 14). Thereafter on the 19th day of April, the plaintiffs in error, through counsel, moved the court for leave to withdraw the pleas of guilty theretofore entered, and enter pleas of not guilty, which motion was by the court denied. The record relative to this is as follows: "Now on this 19th day of April defendants, Logan Billingsley, Fred Billingsley and Ora Billingsley, appeared in court with counsel, William R. Bell, and moved to withdraw pleas of guilty heretofore entered, and enter pleas of not guilty;

Clarence L. Reames and Clay Allen appeared for the plaintiff. The motion is argued by respective counsel, and motion denied by the court; exception is granted." (Tr. p. 14). Thereupon the court sentenced the plaintiff in error, Logan Billingsley, to imprisonment in the United States Penitentiary at McNeil's Island for a term of thirteen months, and the plaintiff in error, Fred Billingsley, to a term of six months in the county jail of Whatcom County. (Tr. pp. 15, 16, 17). From the judgment of the court upon a petition regularly filed and presented, a writ of error was granted (Tr. pp. 23, 24 and 25), bringing before this court for review the action of the trial court in refusing to permit plaintiffs in error to withdraw their pleas of guilty entered without the presence or aid of counsel, and enter pleas of not guilty to the crime charged in the indictment.

ASSIGNMENT OF ERRORS.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying the defendants, Logan Billingsley and Fred Billingsley, the right to withdraw their pleas.

II.

That the United States District Court in and for the Western District of Washington, Northern Division, erred in refusing to permit the said defendants to withdraw their pleas of guilty and to substitute pleas of not guilty.

III.

That the said court erred in passing the sentences imposed upon the said defendants.

IV.

That the said court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States.

ARGUMENT.

I.

The principal question involved is the right of a defendant who has entered a formal plea of guilty to the charge contained in the indictment to withdraw that plea before sentence has been imposed, and to substitute therefor a plea of not guilty, and be accorded a trial upon the merits. The authorities generally hold that a defendant has the right to withdraw either a plea of guilty at any time before sentence, and, in certain exceptional cases even after judgment has been pronounced, and substitute therefor a plea of not guilty; or has a right to withdraw a plea of not guilty and substitute therefor a plea of guilty at any time before the verdict of the jury has been received and filed. This right, however, under the decisions of the appellate courts of the several states is subject to the discretion of the trial court, which discretion is not absolute and unreviewable, but, on the contrary, is a judicial discretion, and as such subject to review.

Krolage v. People, 224 Ill., 456;

Pope v. State, 56 Fla. 81;

Green v. State, 88 Ark. 290;

Curran v. State, 53 Ore. 154;

State v. Stevenson, 64 W. Va., 392;

Beardon v. State, 79 S. E. Rep. 79, (Ga.).

In *Pope v. State, supra*, the rule adopted by the state courts is well and clearly stated as follows:

“In a criminal prosecution a defendant has a right to plead guilty and the effect of such a plea is to authorize the imposition of the sentence prescribed by law upon a verdict of guilty of the crime sufficiently charged in the indictment or information. The plea should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertance or ignorance. 12 Cyc. 353. While the trial court may exercise discretion in permitting or refusing to permit a plea of guilty to be withdrawn for the purpose of pleading not guilty, yet such discretion is subject to review by an appellate court. A defendant should be permitted to withdraw a plea of guilty given unadvisedly when application therefor is duly made, in good faith, and sustained by proofs, and proper offer is made to go to trial on a plea of not guilty. The law favors trials on the merits, and if the discretion of the trial court is abused in denying leave to withdraw a plea of guilty and go to trial on the merits, the appellate court may interfere.”

In the case of *Krolage v. People, supra*, the defendant when first arraigned on an indictment charging him with embezzlement entered a plea of not guilty; thereafter, at the next term of court, he appeared with counsel and withdrew that plea and entered a plea of guilty. Certain evidence was then introduced and a further hearing of the case

continued. Subsequently, and before sentence, the defendant sought to withdraw the plea of guilty and substitute his original plea of not guilty, which application was denied by the Court. The record on appeal discloses that at the time of the substitution of the plea of guilty the court explained to the defendant that under such a plea it would be the duty of the court to sentence him to the penitentiary, and asked him if he so understood the effect of such a plea, to which inquiry the defendant answered that he so understood the matter, and thereupon the sentence was imposed. In discussing the question the appellate court used the following language:

“It is insisted upon behalf of the defendant that the explanation made by the court was not a compliance with the above requirement of the statute, and in our view of the case that contention must be sustained. The foregoing section of the statute was evidently passed for the purpose of securing to a person charged with crime the right to a trial by jury, unless he should, after an opportunity to fully and fairly understand the consequences of a plea of guilty, waive that right. In a certain sense pleas of guilty in criminal procedure have been discouraged by the courts. In some states pleas of guilty to a charge of murder are not received. In others on a plea of guilty a case must stand continued. *People v. Knoll*, 20 Cal. 164. In still others statutes provide that the court may permit the plea of guilty to be withdrawn at any time before judgment, and such statutes

have been construed to give the defendant an absolute right to withdraw the plea. *State v. Hortman*, 122 Ia. 124. Under our statute the plea of guilty may be entered in all criminal cases, and the court may, in the exercise of a sound legal discretion, if the plea is understandingly made, refuse permission to withdraw it. *Gardner v. People*, 106 Ill. 76. The plea can only be entered after the defendant has been fully advised by the court of his rights and the consequences of his plea. Here there was no attempt whatever on the part of the court to inform the defendant of his rights, or to state the effect of the plea of guilty. The mere inquiry whether he understood that if he pleaded tentiary, and his answering that he did so understand was no explanation whatever on behalf of the court. The length of time which he might be sentenced and serve in the penitentiary, and his right to trial by jury if he entered the plea of not guilty, were left entirely to his own knowledge and information, unexplained by the court. * * * The withdrawal of the plea of guilty should not be denied in any case where it is evident that the ends of justice will be subserved by permitting the plea of not guilty to stand in its stead. 'The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty'. *State v. Williams*, 35 La. Annual 1357. *State v. Coston*, 113 La. 1717. 'As the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence, it is the Eng-

lish practice not to receive such pleas unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment. 1 Archbold on Criminal Practice and Pleading, 18 Ed. 334. And, by analogy we think the defendant should be permitted to withdraw his plea of guilty when unadvisedly given, when any reasonable ground is offered for going to the jury. This is a matter within the discretion of the court, but a judicial discretion which should always be exercised in favor of innocence and liberty. The courts should so administer the law and construe the rules of practice as to secure a hearing upon the merits if possible. *Gauldin v. Crawford*, 30 Ga. 674. The law favors a trial on the merits by a jury.' *DeLoach v. State*, 77 Miss. 691."

In *Beardon v. State*, *supra*, the rule is broadly stated as follows:

"The law provides a different means for avoiding the consequences of a plea of guilty. A defendant may withdraw his plea of guilty as a matter of right before sentence is imposed, and he may withdraw his plea after sentence has been imposed, if for any meritorious reason it addresses itself to the sound discretion of the trial court. If there is any valid and sufficient reason why the defendant should be permitted to withdraw his plea after sentence in order to prevent injustice, the failure of the court to exercise its discretion in favor of the withdrawal of the plea is an abuse of discretion."

See also *State v. Hortman*, 122 Ia., 124.

1 Remington & Ball. Code of Washington, Sec. 2111.

It is a general rule established and enforced by every appellate court which has had occasion to deal with this question, if a defendant, when arraigned seeks to introduce a plea of guilty to the charge lodged against him, he must be appraised by the trial judge of the effect of such a plea, and the consequences which will follow if the plea is received; and if this is not done, a refusal to permit the withdrawal of the plea and to substitute a plea of not guilty before judgment is an abuse of discretion. And this is true whether or not there is a guiding and controlling statute on the subject. In the federal courts the practice of the English Courts on the subject is more strictly adhered to, and consequently the rights of a defendant in a criminal case more jealously safe guarded. A plea of guilty is here regarded, and properly so, as a confession, and the confession, whether made formally in court, or informally out of court, is never received as evidence of defendant's guilt, unless he be first warned clearly and fully of its effect and consequences.

In 5 Ency. of the United States Supreme Court Reports, page 108, the rule is briefly stated:

*“A plea of not guilty after plea of guilty.—*When the accused is arraigned and pleads guilty or confesses the indictment, it is usual for the court to refuse to record such plea or confession, but admit him to plead not guilty.”

In the case of *Hallinger v. Davis*, 146 U. S. 314, the proper course in such cases is clearly indicated. The defendant when first arraigned pleaded guilty to the indictment, but the court refused to accept the plea, and ordered it to be held in abeyance subject to the defendant's consultation with counsel, who was then assigned to him for the purpose of consultation concerning such plea. Some days later the defendant and his counsel again appeared and insisted on said plea of guilty, whereupon the court continued said assignment of counsel, and continued the cause until a later date, and then on the arrival of that date, and not until then, was the plea of guilty accepted and acted upon.

In *Bram v. U. S.*, 168 U. S. 532, 545, a leading criminal case in this country, the correct procedure is clearly indicated. In the opinion in that case, quoting from the early English authorities, it is said:

“In Hawkins Pleas of the Crown (6th Ed. by Leach, published in 1787) Book 2, Chap. 31, it is said, Sec. 2: ‘Where a person upon his arraignment actually confesses he is guilty or unadvisedly disclosed the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges upon proper circumstances that such confession may proceed from fear, menace or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead

not guilty. In the second volume (Lord Hale's Pleas of the Crown) at page 225 it is said: 'A confession is either simple or relative in order to the attainment of some other advantage; that which I call a simple confession is where the defendant upon hearing of his indictment, without any other respect confesseth it, this is a confession, but it is usual for the court, specially if it be out of clergy to advise the party to plead and put himself upon trial, and not presently to record his confession, but to admit him to plead.' 27 Assiz. 40. If it debut an extra judicial confession, although it be in court, as where the person freely tells the fact and demands the opinion of the court whether it be felony, though upon the fact thus shown it appeared to be felony, the court will not record his confession, but admit him to plead to the felony not guilty."

In the present case the record discloses that the plaintiffs in error appeared without counsel, and were arraigned and called upon instanter to plead to the indictment herein. It discloses further, that the court before receiving their pleas of guilty failed to explain to them their right to a trial on the merits before a jury, and neglected to inform them of the effect of such a plea, and the consequences which must follow, if the same were accepted by the court. As the record briefly shows, the arrignments took place on the 10th day of January, 1917, and the plea of guilty accepted and entered immediately thereafter. The sentence, however, for some pur-

pose, not disclosed by the record, was not imposed until the 19th day of April following. In the meantime plaintiffs in error asked leave to withdraw their original plea and enter a plea of not guilty, which petition was denied. In the face of the record before this court this was a clear abuse of discretion. In the first instance the court should have refused to accept the plea of guilty until after the plaintiffs in error had been assigned counsel to consult with them regarding their proffered plea, and, in any event, should have refused to receive such a plea until he had clearly impressed upon them the effect and consequences which would necessarily flow from its reception. Absolutely nothing was done by the court to appraise the plaintiffs in error of their constitutional rights, or to safe guard their liberties. On the contrary when they had in some way become apprized of their rights in the premises, and before their plea of guilty had been acted upon, he refused to permit such pleas to be withdrawn, and prevented them from having their constitutional right of a trial by jury on the merits of the charge contained in the indictment.

II.

If the indictment to which the plaintiffs in error pled guilty did not state facts sufficient to consti-

tute an offense under the laws of the United States, then it was error to impose sentence upon them. This indictment charged a violation of Sec. 238 of the Penal Code of the United States; this section is as follows:

“Any officer, agent or employee of any railroad company, express company or other common carrier who shall knowingly deliver or cause to be delivered to any person, other than the person to whom it has been consigned, unless upon the written order in each instance of a bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spiritous, vinous, malted, fermented or other intoxicating liquor of any kind which has been shipped from one state, territory or district of the United States or place non contiguous to but subject to the jurisdiction, or into any other state, territory or district of the United States or place non contiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory or district of the United States or place non contiguous to but subject to the jurisdiction thereof, shall be fined not more than \$5,000, nor imprisonment not more than two years or both.”

The indictment in this case does not allege, or attempt to allege, that the plaintiffs in error were, or that they had been at any time officers, agents or employees of any railroad company or other common carrier engaged in Interstate Commerce, consequently they could not be guilty of a violation of

the penal section just above quoted, and upon which the indictment herein was based.

We submit that the lower court erred, and that this cause should be reversed and remanded with instructions to quash the indictment herein and discharge the plaintiffs in error from custody, or at least that the cause be reversed and remanded with instructions to permit the withdrawal of their pleas of guilty and the substitution of their proffered plea of not guilty to the indictment.

Respectfully submitted,

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